FILE COPY.

FILED
OCT 2 1906
JAMES H. McKENNEY,

No. 244.

Supreme Court of the United States.

ALBERT K. HISCOCK, as Trustee in Bankruptcy of JACOB M. MERTENS, et al, Bankrupts,

Plaintiff in Error,

against

THE VARICK BANK OF NEW YORK,

Defendant-in-Error.

Notice and Petition of Defendant in Error.

FREDERICK M. CZAKI,
Counsel for Defendant-in-Error.
11-19 William Street,
Manhattan, N. Y.

Supreme Court of the United States.

ALBERT K. HISCOCK, as Trustee in Bankruptcy of JACOB M. MERTENS *et al.*, Bankrupts,
Plaintiff in Error,

against

THE VARICK BANK OF NEW YORK,
Defendant in Error.

October Term, 1906. No. 244.

Sir.—You will please take notice, that upon all the proceedings had herein, the transcript of record filed in the office of the Clerk of this Court on the 2nd day of April, 1906, and the annexed petition of the Varick Bank of New York, the undersigned will respectfully move this Court at the October Term thereof, to be held at the Capitol in the City of Washington, District of Columbia, on the 22nd day of October, 1906, at 12 o'clock noon of said day, or as soon thereafter as counsel can be heard, for the entry of a rule or order which shall direct that the appeal or writ of error taken by the above named plaintiff in error, be dismissed, or in the alternative that the judgment, decree and mandate of the United States Circuit Court of Appeals for the Second Circuit, shall in all respects and things, be affirmed upon the

grounds and for the reasons as more particularly appear in said petition hereto annexed, and that the defendant in error be awarded costs and disbursements, and such further and other relief as may to this honorable court seem just and proper.

Dated New York, September 19th, 1906.

Yours, &c.,
FREDERICK M. CZAKI,
Solicitor for Defendant in Error,
Office and P. O. Address,
15 William Street,
New York City,
(Borough of Manhattan).

To WILL B. CROWLEY, Esq.,
Solicitor for Plaintiff in Error,
Office & P. O. Address,
White Memorial Building,
Syracuse, New York.

SUPREME COURT OF THE UNITED STATES.

ALBERT K. HISCOCK, as Trustee in Bankruptcy of JACOB M. MERTENS *et al.*, Bankrupts,
Plaintiff in Error,

against

THE VARICK BANK OF NEW YORK,
Defendant in Error.

October Term, 1906. No. 244.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of the Varick Bank of New York respectfully shows and alleges to this Honorable Court as follows:

I.—On August 18th, 1903, an involuntary petition in bankruptcy was filed against Jacob M. Mertens and others, composing the firm of J. M. Mertens & Co. On September 15th, 1903, the co-partnership and the individuals composing it, were adjudicated bankrupts, and on October 14th, 1903, the plaintiff in error was elected the trustee of the estates of both the co-partnership and the individuals.

II.—That at the time of the filing of the petition, the co-partnership was indebted to the defendant in error in the sum of Twenty-seven thousand eight hundred and ninety-three and 35/100 Dollars ($27,893.35). This indebtedness was predicated upon sundry promissory notes and bills receivable respectively consisting of two classes:

(1) Five collateral notes aggregating in amount Twenty-two thousand five hundred dollars ($22,500), made or endorsed by Jacob M. Mertens individually.

(2) The notes of third persons, firms or corporations endorsed by the co-partnership and by Jacob M. Mertens individually, which had been discounted by the defendant in error.

III.—All of the collateral notes were of the same form, differing merely as to the amount, date and property pledged as security. They contained the provision that upon default in the payment of any of the liabilities due from the makers to the defendant in error, the note and any and all other indebtedness became forthwith due and payable without demand or notice; full power and authority was given to the defendant in error to sell or dispose of the securities at public or private sale without demand, advertisement or notice of any kind which were expressly waived, and granted to the defendant in error the right to purchase at such sale, the makers and endorsers waiving any right of equity of redemption in the event of default and sale.

IV.—Pledged to secure the payment of these five collateral notes, were two policies of insurance upon the life of Jacob M. Mertens individually. One was for the sum of Fifty thousand ($50,000) Dollars, issued by the Equitable Life Assurance Society on the 15th of February, 1889, and No. 417171. It was payable to Jacob M. Mertens or his estate. It was known as a free Tontine policy, the Tontine dividend period expiring on the 15th day of February, 1909.

The second policy was for the sum of Ten thousand ($10,000) Dollars issued on the 21st day of

December, 1882. It was payable to Jennie Mertens, wife of Jacob M. Mertens, or in the event of her prior death, to the children of the insured. It was known as a Tontine Savings Bank policy, the Tontine period having expired on the 21st day of December, 1902, at which time under the terms of the policy, Mertens as the insured, had withdrawn in cash the share of the accumulated surplus, apportioned by the Society to the policy, and continued the policy in force on the ordinary plan. 13

V.—On the 16th of March, 1901, nearly two and a half years prior to the date of the filing of the petition in bankruptcy, Jennie Mertens and the children of Jacob M. Mertens and Jennie Mertens, executed an absolute assignment of the Ten thousand dollars policy to the defendant in error. On the 25th of March, 1901, this assignment was followed by a further assignment of the same policy by Mertens and his wife to the defendant in error. On the 21st of March, 1901, Jacob M. Mertens individually executed an assignment of the Fifty thousand dollar policy to the defendant in error. These assignments transferred to the defendant in error all of the interest of the insured and of the beneficiaries in the policies for the payment of the debts due or to be created by the co-partnership with the defendant in error, giving a right to the defendant in error to surrender the policies on default in the payment of the debts. 14 15

The policies were delivered to the defendant in error at or about the date of the assignments by Jacob M. Mertens and have since remained in its possession uninterruptedly.

VI.—On the day of the filing of the petition, obligations aggregating Sixteen hundred and ninety-one and 93/100 Dollars ($1,691.93) had ma-

16 tured and remained unpaid, and on September 15th, 1903, the day of the adjudication, obligations aggregating Thirteen thousand five hundred and thirty dollars and 47 cents ($13,530.47) had matured and remained unpaid. In the latter amount, was included two of these collateral notes of Five thousand Dollars each, both endorsed by Jacob M. Mertens individually, and quite $2,000 of the notes of third persons which had likewise been endorsed by Mertens individually.

VII.—On September 14th, 1903, subsequent to the filing of the petition in bankruptcy, and prior
17 to the adjudication, the defendant in error offered for sale and sold to the highest bidder at public auction by a duly licensed auctioneer at the New York Real Estate Sales Rooms in the City of New York, Borough of Manhattan, the two policies held as collateral security. The policies were sold separately. The Fifty thousand dollar policy was sold for Seven thousand Dollars, and the Ten thousand dollar policy for Thirty-two hundred and fifty dollars. Both policies were purchased by an agent of the defendant in error at its request and in its interests.

18 VIII.—On September 10th, 1904, the defendant in error filed as unsecured, a claim against the co-partnership estate for the sum of Twenty-seven thousand eight hundred and ninety-three and 85/100 Dollars ($27,893.85), and likewise a claim against the individual estate of Jacob M. Mertens as secured for the sum of Twenty-five thousand four hundred and eighty-nine and 62/100 Dollars ($25,489.62).

Subsequently and on December 1st, 1904, amended claims were filed, one against the co-partnership as unsecured for the same amount as the original

claim and another against the individual estate of Jacob M. Mertens as secured. This latter claim set forth the security which the defendant in error had theretofore held, its disposition in accordance with the terms of the contract under which the security had been pledged to it, the amount realized therefor, and the balance due, to wit, Nine thousand one hundred and eighteen and 37/100 Dollars ($9,118.37). 19

IX.—Prior to the filing of the amended claims, the plaintiff in error had filed objections to the allowance of the original proofs of claims, which as to the co-partnership claim, alleged in substance that the two policies were not the property of Jacob M. Mertens individually, but the property of the co-partnership, and hence that the defendant in error had failed to allege that it held these policies as security for the payment of that debt and had failed to credit their value. 20

The objections to the claim against the individual estate alleged that the value of the policies had not been ascertained as provided by Sub-division H of § 57 of the Bankrupt Law.

Upon the filing of the amended claims, it was stipulated that the objections filed to the original proofs of claim should stand as objections to the amended proofs. 21

X.—A hearing was had before the Referee upon the objections as thus filed, at which it was conceded by the plaintiff in error, that the policies were sold at public auction to the highest bidder as heretofore alleged; notwithstanding which, the Referee refused to allow either of the claims, and made an order *ex-parte* directing the defendant in error to resell the policies upon notice to the plaintiff in error.

XI.—Upon review before the District Court of the United States for the Northern District of New York, the disallowance of the claims by the Referee was affirmed, and an order was entered from which the defendant in error duly appealed to the United States Circuit Court of Appeals for the Second Circuit, wherein the order of the District Court of the United States for the Northern District of New York disallowing the claims of the defendant in error was in all respects and things reversed, and a mandate issued directing that the claims be allowed as filed. From this order and mandate of the United States Circuit Court of Appeals for the Second Circuit, the plaintiff in error has appealed to this Court.

XII.—That your petitioner verily believes and is so advised by its solicitor, that the said plaintiff in error has appealed to this court for the purpose of delay only. That all of the material questions presented by the assignments of error filed by the said plaintiff in error have been fully settled by prior decisions of this Honorable Court adversely to the contentions of the said plaintiff in error, that it is manifest that the appeal is taken for delay only, and that the assignments of error present questions so frivolous as to require no further argument before this Honorable Court.

WHEREFORE, for these and divers other reasons, as will more particular appear from the printed argument and brief of your petitioner's solicitor, your petitioner does respectfully pray this Honorable Court that a rule, order and decree be made and entered herein, which shall direct that the appeal of the plaintiff in error be dismissed, and that the judgment of the United States Circuit Court of Appeals for the Second Circuit be affirmed with costs, and that your petitioner have such

further and other relief as to this Honorable Court may seem just, meet and proper. 25

And your petitioner will ever pray.

VARICK BANK OF NEW YORK,
JOHN T. SPROULL, Prest.,
Petitioner.

FREDERICK M. CZAKI,
Solicitor for Petitioner,
Office & P. O. Address,
15 William Street,
New York City.

26

STATE OF NEW YORK, }
City and County of New York. }

JOHN T. SPROULL, being duly sworn, deposes and says: That he has read the foregoing petition and knows the contents thereof. That the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That your deponent is the President of the Varick Bank of New York, and the reason this verification is made by your deponent is because the petitioner is a corporation. 27

JOHN T. SPROULL.

Sworn to before me this }
27th day of September, 1906. }
~~J. H. Donzelon,~~ Conrad Krug
Notary Public, no. 75.
(SEAL) New York County.

FILE COPY.

No. 244.

Supreme Court of the United States.

Office Supreme Court U. S.
FILED
OCT 2 1906
JAMES H. McKENNEY,

ALBERT K. HISCOCK, as Trustee in Bankruptcy of JACOB MERTENS, et al, Bankrupts,

Plaintiff in Error,

against

THE VARICK BANK OF NEW YORK,

Defendant-in-Error.

Brief and Argument of Defendant in Error.

FREDERICK M. CZAKI,
Counsel for Defendant-in-Error.
11-19 William Street,
Manhattan, N. Y.

SUPREME COURT OF THE UNITED STATES,

ALBERT K. HISCOCK, as trustee in Bankruptcy of Jacob M. Mertens *et al*, Bankrupts,
Plaintiff in Error,

against

THE VARICK BANK OF NEW YORK,
Defendant in Error.

Brief and Argument of Defendant in Error.

STATEMENT.

This is a motion made by the defendant in error to dismiss the appeal taken by the plaintiff in error, or in the alternative to affirm the judgment of the United States Circuit Court of Appeals for the Second Circuit, upon the ground that it is manifest that the appeal was taken for delay only, the questions presented by the assignments of error having all been decided adversely to the plaintiff in error by prior authoritative decisions of this Court.

Facts.

Concisely stated, the transcript of the record discloses that on August 18th, 1903, an involuntary petition in bankruptcy was filed against the firm of J. M. Mertens & Co., and the individual members composing it. They were adjudicated such on the 15th of September following, and thereafter and on October 14th following, the plaintiff in error was elected as trustee in bankruptcy of both the copartnership and the individual estates (fol. 89).

At the time of the filing of the petition in bankruptcy, the copartnership and Jacob M. Mertens, its senior member, were indebted to the bank in an amount exceeding Thirty-five thousand dollars ($35,000) (fol. 89). Of this amount Twenty-two thousand five hundred dollars ($22,500) was evidenced by five collateral promissory notes, each executed upon a like form, and which contained an absolute power of sale in the event of default in the payment of any of the obligations held by the bank, and granting it power to sell the same at public or private sale with or without notice, and to become the purchaser thereof at any such sale freed of the equity of redemption of the pledgors (fols. 90-91).

Jacob M. Mertens individually was either a maker or endorser on all of these collateral notes.

As security for the payment of these notes, and the other indebtedness held by the bank Jacob M. Mertens individually pledged two policies of insurance upon his life, one of Fifty thousand dollars, and the other of Ten thousand dollars (fols. 94-100).

On August 18th, the date of the filing of the petition, obligations aggrevating Sixteen hundred and ninety-one and 93/100 Dollars ($1691.93) en-

dorsed by Jacob M. Mertens had matured and remained unpaid, and on September 15th, 1904, the day of the adjudication, obligations aggregating in the amount of Thirteen thousand five hundred and seventy and 47/100 Dollars ($13570.47) had matured and remained unpaid. In the latter amount was included two of these collateral notes of Five thousand Dollars each, both endorsed by Jacob M. Mertens individually, and quite Two thousand Dollars of the notes of third persons which were likewise endorsed by Jacob M. Mertens, individually (fols. 9-11).

On the 14th day of September, 1903, the Bank caused these two policies to be sold at public auction to the highest bidder by a duly licensed auctioneer at the New York Real Estate Sales Rooms in the City of New York, Borough of Manhattan, the same having been purchased by an agent of the bank at its request and in its interests (fols. 111-114).

Thereafter the bank filed with the Referee in charge of the proceedings, two proofs of claim, one against the copartnership estate as unsecured aggregating Twenty-seven thousand eight hundred and ninety-three and 85-100 Dollars ($27,893.85), and another against the individual estate of Jacob M. Mertens for the sum of Nine thousand one hundred and eighteen and 37/100 Dollars ($9118.37) as secured (fols. 5-20).

Objections were filed to both of these claims by the plaintiff in error, which in substance alleged that the sale of the policies was illegal, that the value of the securities held by the bank had not been ascertained as required by the Bankrupt Act, and that the policies were still held by the bank as collateral to the said indebtedness, the plaintiff in error still owning the equity (fols. 27-33).

Thereafter the claims were amended to overcome some of the immaterial objections filed (fols. 13-26), and the objections filed to the original proofs of debt were considered as filed to the amended proofs (fol. 35).

A hearing was thereupon had before the Referee, and it was then mutually *conceded that the two policies were delivered to a duly licensed auctioneer by the attorneys and agents of the bank with instructions to sell the same at public auction at the New York Real Estate Sales Rooms on the 14th day of September, 1902, to the highest bidder. That the policies were thus offered for sale and sold to the highest bidder,* the Fifty thousand Dollar policy for the sum of Seven thousand dollars, and the Ten thousand dollar policy for the sum of Thirty-two hundred and fifty dollars ($3250).

It was further conceded that no notice of the sale was given to any one except the bank (fols. 35-38).

No other evidence whatsoever was offered by the plaintiff in error upon the hearing before the Referee under the objections.

The solicitor for the defendant in error thereupon requested to know of the trustee and his solicitor, whether they rested their case under the objections as filed to the proofs of claim of the plaintiff in error. Receiving no response, the solicitor for the defendant in error moved that the referee decide that the burden of proof in the proceeding was upon the trustee (fols. 38-39).

Thereupon the referee held in substance, that the sale of the policies by the defendant in error as disclosed by the record, was fraudulent and void. That the value of the securities had not been ascertained in accordance with the provisions of § 57, Sub-division H of the Bankrupt Law, and

refused to allow either claim as established against the estate or estates (fols. 39-40).

Thereupon the counsel for the plaintiff in error moved the referee to direct a method by which the security held by the defendant in error should be liquidated, and that in so doing, he direct the bank to re-sell the policies upon notice to the trustee.

Objection was taken to this motion, and thereafter, the referee granted the motion and noted an exception in favor of the defendant in error (fol. 41).

Thereupon the defendant in error petitioned for a review of the ruling and determination of the referee before the District Court of the United States for the Northern District of New York, as the result of which, the Referee's ruling disallowing the claims was approved and affirmed in a memorandum of opinion (fols. 42-49), 134 Fed. Rep., 101, and an order thereupon entered in accordance with the learned District Judge's opinion (fols. 50-51).

From the order of the District Court affirming the Referee's rulings disallowing these claims, the defendant in error appealed to the United States Circuit Court of Appeals for the Second Circuit, as the result of which the determination of the District Court was in all respects reversed in a memorandum of opinion handed down by the presiding justice (fols. 78-87), 144 Fed. Rep., 818, and an order and mandate thereafter issued to the District Court with instructions to proceed conformably with the opinion of the Circuit Court of Appeals.

Thereupon the plaintiff in error appealed to this Court, and assigns as error—

First.—That the order made by the Referee and the District Court was not a rejection of the claims of the defendant in error.

Second.—That the policies in question were the property of the co-partnership estate, and not the individual estate of Jacob M. Mertens, and hence that the United States Circuit Court of Appeals erred in directing the allowance of the copartnership claim in full.

Third.—In holding that the sale of the policies was a good and valid sale, and passed a good and valid title thereto to the defendant in error.

Fourth.—In holding that the value of the securities had been properly liquidated under the terms of the provisions of § 57, Subdivision H, of the Bankrupt Act.

Fifth.—In refusing to hold that the policies could not be liquidated or sold except pursuant to an order of the Court.

Sixth.—In holding that the Bankrupt Act did not suspend and enjoin the exercise of the power of sale contained in the collateral notes, intermediate the date of the filing of the petition in bankruptcy and the adjudication, and that the sale thus held was *ipso facto* void.

Seventh.—In holding that the claim against the individual estate should be allowed in full.

Eighth.—In holding that the burden of proof that the sale of the policies was unfair, was upon the plaintiff in error.

Ninth.—In refusing to hold that it was discretionary with the Referee to refuse to allow the claims presented, or to suspend their allowance.

Tenth.—In holding that there was no evidence that the policies had a larger value than was obtained at the sale.

POINTS.

I.

The first assignment of error, that the determination of the Referee and the District Court was not tantamount to a rejection of the claims of the defendant in error, is frivolous.

The Referee in disallowing the claims said:

> "As the proof now stands, *I shall therefore decline to allow either claim* as established against the estate or estates" (fol. 40) (italics ours).

Upon review the learned District Judge in his opinion stated:

> "Objections having been filed by the trustee to the allowance of each claim mainly on the ground that the value of such collateral had not been properly ascertained or credited, and that the value of the policies had not been ascertained as provided by Subdivision H, § 57 of the Bankrupt Act, *the Referee disallowed both claims as matters stand,* and made an order prescribing the method for ascertaining the value of such securities" (fol. 43) (italics ours).

The conclusion of the learned District Judge is stated at the end of his opinion as follows:

> *"The orders of the Referee disallowing the claims are approved and affirmed"* (fol. 49) (italics ours).

The order entered upon the opinion of the District Judge provides:

> "Ordered that the ruling of the said Referee rendered herein on the 2nd day of December, 1904, be and the same hereby is in all respects and things approved and affirmed" (fol. 51).

The Honorable Presiding Justice of the Circuit Court of Appeals in writing the opinion of the Court said:

> "We entertain no doubt that the order appealed from was in substance and effect a rejection of the claims such as to authorize an appeal pursuant to § 25 of the Bankrupt Act as well as a review pursuant to § 24. The bank insisted that its claims were for a definite amount, the amount stated in its proofs of debt, less the amount which it had already derived from the sale of the securities. *The decision not only disallowed these claims, but left the bank remediless, unless it should consent to allow a different reduction"* (fol. 79) (italics ours).

II.

The second assignment of error, that the Circuit Court of Appeals erred in holding that the policies in question did not belong to the co-partnership estate, is likewise frivolous.

Both the original and the amended proofs of

claim affirmatively alleged that the policies in question were the property of the individual estate of Jacob M. Mertens, and were by him deposited with the defendant in error as collateral security for the payment of the debts of the copartnership and of the individual. The original individual proof of debt alleged:

> "And that at the time of the filing of the petition in bankruptcy, said Varick Bank of New York held as collateral security *property of the said bankrupt* (*Jacob M. Mertens*), which property according to the terms of the agreement under which the same was pledged, and previous to the date of the adjudication and the appointment or election of the trustee herein, was converted into money, etc." (fol. 5) (italics ours).

The amended copartnership claim alleged:

> "That at the time of the filing of the said petition, the said Varick Bank of New York held as collateral security for the payment of the said debt, *which said collateral was deposited by Jacob M. Mertens individually*, the following described property, to wit:" (fol. 20) (italics ours).

The Fifty thousand dollar policy was payable to Jacob M. Mertens or his estate, and was assigned by him to the defendant in error on the 21st day of March, 1901, more than two and a half years prior to the filing of the petition in bankruptcy (see Exhibit E & G, fols. 62-65).

The Ten thousand dollar policy was payable to Jennie Mertens, wife of Jacob M. Mertens, or in the event of her prior death, to the children of Jennie and Jacob (see Ex. H, fol. 69).

This policy was assigned by Jennie Mertens and the children of Jacob and Jennie, to the de-

fendant in error on the 16th day of March, 1901 (fol. 73), and was individually assigned by Jennie Mertens to the defendant in error on the 25th day of March, 1901 (see Ex. F, fol. 64).

These assignments transferred to the defendant in error all of the interest of the insured or the beneficiaries in the policies, for the payment of the debts due or to be created by the copartnership with the defendant in error, and gave the defendant in error the right to surrender them upon default of the payment of the indebtedness.

The plaintiff in error specifically admitted in his objections to the copartnership debt, that the policies in question were the property of Jacob M. Mertens individually, and had been deposited by him with the defendant in error.

> "Said claim is further objected to on the ground that certain payments have been credited thereon by Jacob M. Mertens, individually, *and certain credits should have been made thereon on account of collateral securities furnished to said bank by Jacob M. Mertens for the payment thereof*" (fol. 29) (italics ours).

The plaintiff in error offered no proof whatever tending to sustain his contention that the copartnership had any interest whatsoever in these policies.

The learned presiding justice of the Circuit Court of Appeals upon this point says:

> "There was no evidence tending to show that the policies belonged to the copartnership, except the circumstance that on one occasion the partnership made an agreement pledging them to the bank for the payment of a partnership note, and all other liabilities to the bank which might thereafter arise. As

the policies insured the life of Jacob M. Mertens, and were payable one to him or to his legal representatives, and the other to his wife or surviving children, and to him in the event of their death before his, the legitimate presumption is that the title to one of them was his absolutely, and the title to the other was in his wife, his children and himself. *The circumstance that the partnership pledged them does not offer a scintilla of legal evidence that the title was in the partnership.* There are instruments to which the title passes by delivery, such as notes and ordinary bonds for the payment of money. Possession of an instrument of this class is presumptive evidence of title, and the holder can recover in an action upon it by producing it upon the trial without further evidence of title. But a policy of insurance does not belong to this class of instruments, and because possession is not *prima facie* evidence of title, no recovery can be had by the holder upon it, when not payable to him, without proof of an assignment.

The agreement pledging the policies was not even moral evidence that they were owned by the partnership, because it appears that Jacob M. Mertens joined in it individually by a separate agreement executed contemporaneously, and endorsed upon its back'' (fols. 80-81) (italics ours).

III.

This court will not consider the question presented by the third assignment as to whether the sale of the policies was good and valid and passed a good and valid title to the defendant in error.

The contracts of pledge were made, executed and to be performed in the State of New York, and the rights of the parties are governed by the law of that State. No Federal question is involved.

Thompson *vs.* Fairbanks, 196 U. S., 516-522;
Humphrey *vs.* Tatman, 198 U. S., 91.

The plaintiff in error in his objections to the claim, did not allege any fraud on the part of the defendant in error in the sale or disposition of the policies, and failed to prove that any fraud was committed.

The policies were pledged nearly two and a half years prior to the filing of the petition in bankruptcy, and no question was raised as to the *bona fides* of the transactions in which the policies were pledged.

The policies were sold by the bank in accordance with the terms of the contracts under which they were pledged, and the fact that they were sold without notice to any one except the bank, and that the bank became the purchaser, does not in the absence of fraud, in any way invalidate the sale.

Baker *vs.* Drake, 66 N. Y., 518;
Williams *vs.* The United States Trust Co., 133 N. Y., 660;
Gillet *vs.* Bank of America, 160 N. Y., 549;
Toplitz *vs.* Bauer, 161 N. Y., 325;
Bailey *vs.* American Deposit Co., 52 App. Div., 402;
Palmer *vs.* Mut. Life Ins. Co. of N. Y., 38 Misc., 318;
Genet *vs.* Howland & Aspinwall, 45 Barb., 560;
Franklin Natl. Bank *vs.* Newcombe, 1 App. Div., 297; aff. 157th N. Y., 699;
Wheelwright *vs.* St. Louis, 56 Fed. Rep., 164;
Fidelity Ins. Trust and Safe Deposit Co. *vs.* Roanoke Iron Co., 81 Fed. Rep., 439.

The learned Circuit Court of Appeals for the Second Circuit in its opinion said:

> "The Court below regarded the sale made by the Bank as a fraudulent sale. *There was no evidence of fraud* unless the facts which have been referred to justify the inference of fraud. *We are at a loss to understand how fraudulent conduct can justly be imputed to a pledgee when it appears that whatever was done in executing the power of sale, was done in full compliance with the terms of the pledge, and when there is no evidence that any unconscionable advantage was taken of the pledgor or his creditors*" (fol. 83) (italics ours).

IV.

The contention of the plaintiff in error that the policies in question were not properly liquidated under the provisions of Sec. 57, subdivision H of the Bankrupt Act, is manifestly erroneous.

The section in question provides:

> "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors, or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the Court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

The plaintiff in error contends that this Subdivision be so construed that the words "as the Court may direct" shall relate to all methods provided for liquidation.

If this construction were to prevail, the Court would have a right to direct a liquidation of securities held by a creditor without regard to the contractual rights of the creditor conferred by the agreement under which the securities were pledged to him, and upon the faith of which he parted with his money.

In the case at bar, the defendant in error at the time of the presentation of its claim for allowance, had already liquidated its securities, and the result of the construction contended for by the plaintiff in error, would warrant the court in dis-

regarding what had been done in accordance with the terms of the contracts of pledge, and direct any other mode of liquidation that it might see fit to adopt.

It was never intended by Congress that the Court should have the right to prescribe a different mode of disposing of the pledge than the one agreed upon by the parties. The correctness of this contention is at once manifest when we analyze this subdivision. It provides:

> "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement, pursuant to which such securities were delivered to such creditors."

If we stop at this point, there can be no doubt that a perfect and complete mode of disposing of the pledge is thus provided for, but Congress cognizant of the manner in which pledges of personal property are frequently made, that parties had not by express agreement provided for the disposal thereof, and contemplating the possibility of disputes as to how the pledge should be disposed of, or its value ascertained, provided that the creditor and the trustee may come together, and either by agreement, arbitration or compromise, arrive at the result desired, or if the agreement, arbitration or compromise is impossible then by liquidation.

The Court by this subdivision is only given the right to direct the disposition of the pledge, or the ascertainment of its value, if the parties have failed to do so by their own agreement, and then only as provided by the statute.

The phrase "as the Court may direct" has no grammatical or logical relation to the opening phrase: "the value of securities held by secured

creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors." It limits and applies to that which follows the preposition "or," *i. e.*, "by such creditors and the trustee, by agreement, arbitration, compromise or litigation." That this is the correct analysis is plain when the phrase "as the court may direct" is transposed as though it read as follows:

> "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities are delivered to such creditors, or, as the Court may direct, by such creditors and the trustee by agreement, arbitration, compromise or litigation."

As was correctly stated by the learned Circuit Court of Appeals in its opinion:

> "By the former Act it was provided, that a secured creditor should be admitted as creditor only for the balance of his debt after deducting the value of the pledged property ascertained by an agreement between him and the assignee in bankruptcy, or by a sale under the direction of the Court. Under that provision, if a pledgee sold the pledged property prior to the appointment of the assignee, or without the permission of the Court, he was precluded from proving his claim or obtaining any share of the bankrupt's estate, to which he would have otherwise been entitled. The present act provides that the value of his security may be determined, among other methods, by converting it into money pursuant to his contract rights, and thus if he has enforced it, as the contract with the debtor allowed, he is permitted to prove the unsatisfied balance of his claim. Section 57 Subdi-

vision H, prescribes several modes of valuation, *and the one referred to is exclusive of the others, and is superfluous and useless unless it is intended to authorize the creditor without interference by the trustee or the Court to value his own security provided he turns it into money 'according to the terms of the agreement pursuant to which it was delivered to him'* " (fol. 85) (italics ours).

V.

The fifth assignment of error requires no discussion, as it raises substantially the same question as the fourth.

VI.

The plaintiff in error as trustee, obtained no better title to, or greater rights in the property of the bankrupts than the bankrupts or their creditors had as of the date of the adjudication.

Hewit *vs.* Berlin Machine Works, 194 U. S., 296;
Thompson *vs.* Fairbanks, 196 U. S., 516;
Humphrey *vs.* Tatman, 198 U. S., 91;
York Mfg. Co. *vs.* Cassell, 201 U. S., 344-352.

The question raised by the sixth assignment of error is whether the sale of the policies by the defendant in error was *ipso facto* void, because held intermediate the date of the filing of the petition and the adjudication.

Under the Act of 1867, the title of the assignee in bankruptcy accrued as of the date of the filing of the petition in bankruptcy.

U. S. Revised Stat., §5044.

Under the Act of 1898, the title of the trustee accrues as of the date of the adjudication.

§70, Sub. Div. A.

Under the former act, it was long considered that a lien previously acquired, could not be enforced subsequent to the filing of the petition without permission of the Bankruptcy Court. This Court, however, refused to sanction that view.

Eyster *vs.* Gaff, 91 U. S., 521;
Jerome *vs.* McCarter, 94 U. S., 734.

The radical change in the present Act by which the trustee's title accrues as of the date of the adjudication, must have been intended by Congress to remove whatever uncertainty existed under the prior Act, and this Court has frequently taken occasion to call attention to the necessity of giving due importance to the change in the phraseology of the present Act as compared to the prior one.

Pirie *vs.* Chicago Title & Trust Co., 182 U. S., 438-448.
Bardes *vs.* Bank of Hawarden, 178 U. S., 524.

The House Committee on Judiciary in its report to the House, referring to § 70 of the Act of 1898, says:

"Under § 70, an important change has been made from the former laws as well as from proposed legislation. Under the Act of 1867 as interpreted by Congress, it was held that the title of the bankrupt's property vested in the assignee as of date of the filing of the petition in bankruptcy. This bill provides, that the trustee shall be vested by operation of law with the title of the bankrupt's property as of the date he was adjudged a bankrupt. By this change the alleged bankrupt can sell and convey a perfect title up to the date of the adjudication, and the purchaser does not buy at his own risk, and in default of having secured an imperfect title, by reason of the adjudication which may be made subsequent to the purchase. *It does not follow that because a petition is filed against a person in bankruptcy, he will be adjudged a bankrupt, and it seems proper that the public in dealing with him until he is adjudged a bankrupt, should deal without fear or loss of security as to title.*" Italics ours.

Jerome *vs.* McCarter, 94 U. S., 734, is absolutely controlling and decisive upon the right of the defendant in error to dispose of the collateral in accordance with the terms of the contracts under which it was pledged, upon default in the payment of the debt, whether before or after adjudication.

In that case, certain mortgage bonds had been pledged as collateral security for loans. Bankruptcy proceedings intervened and a Receiver was appointed. Subsequently the bonds were sold by the pledgee, and the contention was made that the pledgee could not dispose of the pledge after the adjudication in bankruptcy. The Court held:

"There is some proof that when the Company became bankrupt (August 28, 1872), some of the bonds were held as collaterals for loans made to the Company smaller in amount than the bonds pledged, but the bonds were

subsequently sold by the pledgees, and the present holders hold them by absolute right. *The position that the pledgees could not sell the pledge after the adjudication in bankruptcy, is quite untenable. It is sustained by nothing in the Bankrupt Act. The bonds were negotiable instruments. They passed by delivery, and even were there no express stipulation in the contracts of pledge that the pledgee might sell on default of the pledgor, such a right is presumable from the nature of the transaction. Certainly the bankrupt act has taken away no right from the pledgee secured to him by his contract"* (italics ours).

It further appeared in that case that some of the bonds were still held by the pledgee and the complainant sought to prevent the disposition thereof. The Court said:

"In regard to the bonds covered by the Mc-
"Carter mortgage, which is the one now in
"suit, we find no error in the decree of which
"the appellants can complain. Most of those
"bonds, though at first issued as collaterals
"for loans made to the mortgagor, have been
"sold and they are now owned by the pur-
"chasers. There are some it is true, that are
"still held in pledge, *but the pledgees have a*
"clear right to use them either by sale or by
"collection until the full amount of the debts
"due from the mortgagors is satisfied." (Italics ours.)

Bacon *vs.* International Bank of Chicago, 131 U. S., CCXVI;
Adams *vs.* Collier, 122 U. S., 382-390;
Avery *vs.* Hackley, 20 Wall., 407;
Clark *vs.* Iselin, 21 Wall., 360;
Sawyer *vs.* Turpin, 91 U. S., 114;
Yeatman *vs.* Savings Institution, 95 U. S., 764;
Stewart *vs.* Platt, 101 U. S., 731;

Fidelity Ins. Trust & Safe Deposit Co. *vs.* Roanoke Iron Co., 81 Fed. R., 439;
Wheelwright *vs.* St. Louis, 56 Fed. Rep., 164;
Hauselt *vs.* Harrison, 105 U. S., 401;
Cook *vs.* Tullis, 18 Wall., 332;
Gibson *vs.* Warden, 14 Wall., 244;
Laughlin *vs.* Calumet & Chicago Canal & Dock Co., 65 Fed. R., 441.

The gist of the complaint of the plaintiff in error, that the sale of these policies was void because held subsequent to the filing of the petition, is founded upon an expression of opinion of this Court in the decision of Mueller *vs.* Nugent, 184 U. S., 1-14. It was there said:

> "It is true of the present law as it was of that of 1867, that the filing of the petition is *caveat* to all the world, and in effect an attachment and injunction. *Bank* vs. *Sherman, 110 U. S., 403.*"

The doctrine of Mueller *v.* Nugent, and Bank *v.* Sherman has no application to the case at bar. As was said by this Court in its opinion in York Mfg. Co. *v.* Cassell, 201 U. S., p. 344-353:

> "The remark in Mueller *v.* Nugent, 184 U. S., 1, 'that the filing of the petition' (in bankruptcy) 'is a caveat to all the world and in effect an attachment and injunction,' was made in regard to the particular facts in that case. The case itself raised questions entirely foreign to the one herein arising, and did not involve any inquiry into the title of a trustee in bankruptcy as between himself and the bankrupt under such facts as are above stated. The dispute in the Mueller case was whether the Court in Bankruptcy had power to compel in a summary way the surrender of

money or property of the bankrupt in the possession of the bankrupt, or of some one for him without resorting to a suit for that purpose."

As was aptly said by the learned Circuit Court of Appeals in its opinion in this case:

"Under the former act, there were many decisions that a lien previously acquired could not be enforced subsequent to the commencement of the proceedings, except with the permission of the Bankruptcy Court. The Supreme Court, however, refused to sanction these decisions, and held that the lienor was entitled to perfect his title and enforce his rights as though no proceeding had been commenced. Eyster *v.* Gaff, 91 U. S., 521; Jerome *v.* McCarter, 94 U. S., 734. The change in the present act by which the trustee's title is that only which exists at the date of the adjudication, removes any uncertainty which arose under the Act of 1867. It was intended we think, to permit all legitimate business transactions between the debtor and those dealing with him, to be carried out and consummated as freely until he has been adjudicated a bankrupt, as though no proceedings were pending. In many cases, the proceeding against an alleged bankrupt is unfounded, and for this and other reasons, never culminates in an adjudication. While the filing of the petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all business dealings with the debtor or to prevent lienors or pledgees from enforcing their contracts. This is its practical effect if the rights and remedies of all concerned are in suspense until it can be ascertained whether an adjudication is or is not to follow the commencement of the proceedings. That Congress did not intend that lienors or pledgees should be prejudiced in enforcing their rights by the commencement of the proceedings in bankruptcy, is indicated

by the change made in the present act with respect to the proofs of claims by secured creditors."

VII.

The filing of the verified proofs of debt established a prima facie case, and entitled the defendant in error to the allowance of its claims in the absence of any proof under the objections filed by the plaintiff in error.

The seventh assignment of error requires no discussion, as it is practically comprehended within those already discussed. The same is true of the ninth assignment of error.

The eighth and tenth will be considered together.

It will be recalled that at the hearing before the Referee, after the mutual concessions with regard to the manner of the disposition of the policies in question had been spread upon the record, the plaintiff in error was requested to state whether he rested. Receiving no response, a motion was then made to have the Referee decide that the burden of proof was upon the plaintiff in error.

This Court has recently held that bankruptcy proceedings are more summary than ordinary suits, and that a sworn proof of claim against a bankrupt is *prima facie* evidence of its allegations in case it is objected to.

Whitney *v.* Dresser, 200 U. S., 532.
In re Dresser, 135 Fed. Rep., 495.
In re Summer, 101 Fed. Rep., 224.
In re Doty, 5 Am. Bankruptcy Rep., 58-60.
In re Shaw, 109 Fed. Rep., 780;
In re Cannon, 133 Fed. Rep., 837-838.

The only evidence as to the value of the policies in question was the conceded fact that they realized $10,250 at the sale. Under the authority of Whitney *v.* Dresser, *supra*, it was incumbent upon the trustee, if he claimed inadequacy of consideration, to prove it. It was likewise incumbent upon him to prove that the sale was fraudulent, although, be it remembered, fraud was not alleged.

THE DEFENDANT IN ERROR SHOULD BE AWARDED SUCH REDRESS AS IT IS IN THE POWER OF THIS COURT TO GRANT, IN VIEW OF THE DELAY AND EXPENSE TO WHICH IT HAS BEEN EXPOSED.

The claims have been in litigation more than two years. The objections to the claims are wholly without merit. The questions presented are not involved by any diversity of opinion among the inferior federal courts, and indeed all have been decided by this Court adversely to the contention of the plaintiff in error.

It is obvious that the defendant in error can receive no compensation from the estate of the bankrupt for all its expenses and loss of interest.

It is respectfully submitted, therefore, that this is a proper case for the exercise of the power of this Court to award damages for delay. As was said in Whitney *vs.* Cooke, 99 U. S., 609:

> "Parties should not be subjected to the delay of proceedings for review in this Court without reasonable cause, and our power to make compensation for the loss occasioned by unwarranted delay, ought not to be overlooked."

All of which is respectfully submitted,

FREDERICK M. CZAKI,
Of Counsel.